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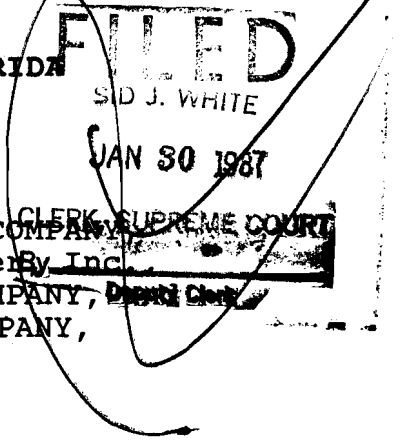
IN THE

SUPREME COURT OF FLORIDA



CASE NO. 69,684

MIAMI HERALD PUBLISHING COMPANY,
a division of Knight-Ridder, Inc.,
SENTINEL COMMUNICATIONS COMPANY,
FLORIDA PUBLISHING COMPANY,

Petitioners,

vs.

HONORABLE WILLIAM CARTER GRIDLEY,
Circuit Judge of Orange County,
Ninth Judicial Circuit, State of Florida,
PAULA HAWKINS, W.E. HAWKINS,
COWLES BROADCASTING, INC., and
CHANNEL TWO TELEVISION CO. OF FLORIDA,

Respondents.

QUESTION OF GREAT PUBLIC IMPORTANCE CERTIFIED BY THE FIFTH DISTRICT COURT OF APPEAL OF FLORIDA

Initial Brief of Petitioners Miami Herald Publishing Company, Sentinel Communications Company, and Florida Publishing Company

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

CASES: Page

STATEMENT OF THE CASE AND FACTS

Paula Hawkins Personal Injury Lawsuit and her Bid for Reelection

On January 5, 1982, Paula Hawkins ("Hawkins" or the "Senator"), then a United States Senator, injured her back in an accident at WESH Channel Two in Orlando, Florida. Approximately four years later, Hawkins and her husband filed a lawsuit against the television station claiming that the accident was due to the station's negligence. The Senator's Complaint, itself a public judicial record, alleges the accident caused her to suffer an injury which has become a physical handicap impairing her ability to work:

> . . . Plaintiff Paula Hawkins was injured in and about her body and extremities, suffered pain thereupon, incurred medical expenses in the treatment of said injuries, suffered physical handicap and her working ability was impaired; said injuries are either permanent or continuing in nature and plaintiff will suffer such loss and impairment in the future. (App. A. 14).[1] (emphasis added)

In order to test the validity of the Senator's public allegations, the defendants commenced discovery. Depositions were taken and interrogatories propounded and answered. The state of the Senator's health was one of the central issues in the personal injury lawsuit.

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[1] The record in this case is set out in Appendix A ("App. A") to this Brief.

At the same time Hawkins was prosecuting this civil action for physical impairment, she continued in her role as United States Senator and actively sought reelection. As a result of the allegations raised by the Senator in the pending lawsuit, her health also became a major issue in the campaign. Throughout, Hawkins maintained that she was physically fit to hold office and that her ability to fulfill her duties as a United States Senator were not in any way impaired. She denied repeated press requests for any information regarding her condition or injury.

The Motion for Access

The health and physical fitness of a candidate for high public office is always a matter of legitimate public concern. Because of the clear conflict between the Senator's legal position regarding her health and her campaign rhetoric, The Miami Herald, The Orlando Sentinel and The Florida Times Union (the "press Petitioners"), prior to the November 4 election, sought access to the deposition transcripts and interrogatory answers ("the Records") directly relating to Hawkins' fitness to serve a second term in the United States Senate. (App. A. 1-19) Timeliness of access, although always important in news reporting, was particularly urgent since the fall election campaign was nearly over.

In the Motion requesting access, the press Petitioners explained that access to the Records would provide information highly relevant to the public's assessment of the Senator's fitness to hold office. Had the Records revealed the Senator to be seriously incapacitated, that information would surely bear on the electorate's judgment as to her physical fitness to hold office.

In addition, since the Senator had steadfastly claimed in her campaign that she was healthy, any documents indicating she was impaired would have reflected adversely on her character for truthfulness and fitness to hold office. (App. A. 12-13) If, in contrast, the Records had shown the Senator was healthy, but had nonetheless filed a lawsuit claiming that she was not, access to the Records would also bear directly on her character for truthfulness. Thus, whatever the Records might have revealed, they were clearly of great public interest on the eve of the general election.

The press Petitioners advanced three legal grounds for public access to the Records. The Florida and federal rules of procedure, the common law, and the First Amendment all made the Records presumptively open to the public. Thus, only a showing of "good cause" or the most compelling reasons could justify limiting access to the Records. Since Hawkins could demonstrate no compelling reason or cause for closure, particularly given

her status as a candidate for reelection to the United States Senate, the Records should be open to the public.

Hawkins' response was twofold. First, she argued that the press Petitioners had no standing to intervene in her lawsuit simply to seek access. Second, she argued that the public had no right to inspect the Records in her "private" personal injury lawsuit. Relying primarily on Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) ("Rhinehart") and Sentinel Communications Co. v. Smith, 493 So.2d 1048 (Fla. 5th DCA 1986), Hawkins contended that the public enjoyed no common law or constitutional right of access to the Records and that her position as a candidate and public official did not alter the legal status of the Records. Claiming only that the release of the Records would constitute an invasion of her privacy, Hawkins made no attempt to demonstrate why the Records should not be released. In the alternative, Hawkins requested that she be given the opportunity to seek a protective order to limit access to the Records. (App. A. 23)

After hearing argument, the trial court held that the press Petitioners had standing to intervene but denied their motion for access, stating:

> This trial Court considers itself bound by the appellate decision of Palm Beach Newspapers, Inc. v. Burk, 471 So.2d 571 (Fla. 4th DCA 1985) which denied such access in an extensive and thorough en banc opinion and also certi-

> fied this very issue to the Florida Supreme Court as being a question of great public importance. This issue is presently pending before the Florida Supreme Court.

In essence, the trial court ruled that the public has no right of access to discovery material in civil litigation unless the parties happen to file it with the court. (App. A. 43-44)

The Rule 9.100(d) Petition

The press Petitioners immediately filed an Emergency Rule 9.100(d) Petition to review the order of the trial court. (App. A. 34-42) The following day, without hearing oral argument, the Fifth District Court of Appeal summarily denied the Petition:

> Based upon the Palm Beach case and the prior opinion of this court in Ocala Star Banner Corp. v. Sturgis, 388 So.2d 1367 (Fla. 5th DCA 1980), we deny the petition. See also Seattle Times Corp. v. Rhinehart, 467 U.S. 20 (1984).

(App. A. 45-46) In addition, the Fifth District certified the following question to this Court as a matter of great public importance:

> Are unfiled discovery materials in a civil case accessible to the public and hence to the press?

(App. A. 46)

On November 25, the press Petitioners timely invoked this Court's discretionary jurisdiction.

SUMMARY OF ARGUMENT

The press Petitioners sought deposition transcripts and other discovery materials which directly related to the character for truthfulness and the physical fitness for office of a United States Senator running for reelection. The records dealt directly with the Senator's physical condition, which the Senator had placed at issue by filing a civil lawsuit for personal injury. Despite the obvious and legitimate public interest in these Records, the courts below denied the public access to them without requiring the Senator to give any justification for closure. The courts' sole reason for this denial was that the Records are "unfiled discovery materials." (emphasis in original) In short, they granted the litigants an absolute right to control public access to the Records. Both courts are in error. The decision of the Fifth District should be reversed and the certified question answered in the affirmative: The public and the press have a qualified right of access to unfiled discovery materials.

This qualified right emanates from three sources. First, the history and plain language of the rules of procedure show that discovery materials were intended to be, and are, presumptively open to the public. Rule 1.280(c), Fla.R.Civ.P., and Rule 26(c), Fed.R.Civ.P.,

permit courts to enter protective orders limiting access to discovery solely for "good cause shown." The party seeking closure may overcome this presumptive right of access to the Records only with (i) a particularized factual demonstration that (ii) he would sustain some significant harm which (iii) outweighs the public interest in access. Second, the Florida and federal common law right of access to judicial records extends to the Records. To overcome the common law presumption of access, the Senator would have to show (i) that closure was necessary to prevent a serious and imminent threat to the administration of justice; (ii) that no less restrictive alternative would suffice to protect her interests; and (iii) that closure would be effective in securing the interests sought to be protected. The only argument raised by Hawkins that the Records are not "judicial records" is that they are not on file with the court. The provision regarding the relocation of files, however, was simply a "housekeeping rule" designed to reduce the document storage burden on the courts. It did not purport to affect public access as, in fact, the relevant commentary shows. Finally, the First Amendment to the United States Constitution creates a presumptive right of access to the Records which can only be overcome by a factual demonstration of "good cause."

The orders of the trial and district courts meet neither the good cause, the common law, nor the First Amendment standards for closure. The trial court did not require Hawkins to make a showing of any kind. Instead, that court held that no showing need be made because the public had no right, qualified or otherwise, to view the Records in the Senator's case. This was error. Because the public does possess a meaningful qualified right of access to the Records, this Court should reverse the decision of the Fifth District and remand this case to the trial court with instructions to determine whether Hawkins can demonstrate sufficiently compelling reasons for closure.

ARGUMENT

I. THE DECISION OF THE FIFTH DISTRICT SHOULD BE REVERSED BECAUSE HAWKINS FAILED TO SHOW "GOOD CAUSE" TO LIMIT ACCESS TO THE RECORDS AS REQUIRED BY THE RULES OF PROCEDURE

The Fifth District denied access to documents directly relevant to the fitness of a candidate for public office solely because of their status as "unfiled discovery materials." (App. A. 45) (emphasis in original) Like the trial court, the district court held that no right to the Records existed and that Hawkins need make no showing of any kind to restrict public access to them. The Fifth District relied on three cases for this proposition:

(i) Palm Beach Newspapers, Inc. v. Burk, 471 So.2d 571 (Fla. 4th DCA 1985) ("Burk"), which the press Petitioners maintain was incorrectly decided and which is pending on review in this Court; (ii) Ocala Star Banner Corp. v. Sturgis, 388 So.2d 1367 (Fla. 5th DCA 1980) ("Sturgis"), which does not support this court's holding; and (iii) Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), which is likewise inapposite. In fact, if Sturgis and Rhinehart are to be followed, this Court must reverse the decision of the Fifth District, since both those cases require that "good cause" be shown to issue any protective order limiting access to discovery materials.

A. The Rules of Civil Procedure Are Based Upon a Presumption of Public Access Which May Only Be Overcome "For Good Cause Shown"

1. Florida Rule 1.280(c) requires a showing of "good cause" before public access to discovery materials can be restricted

The Florida Rules of Civil Procedure create a liberal right to discover information through the processes of the court, but provide a procedural mechanism for regulating that right when a party can demonstrate a particularized need to do so. Rule 1.280(c), Fla.R.Civ.P., plainly states:

> Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good

> cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires . . . .

A Rule 1.280(c) protective order is the proper tool to limit the scope of discovery; it is also the proper tool to limit access to discovery, as Florida courts, prior to Burk, routinely recognized.

The last Florida appellate court to address the issue prior to Burk squarely held that depositions in criminal cases could be closed to the public only "for good cause shown". Short v. Gaylord Broadcasting Co., 462 So.2d 591 (Fla. 2d DCA 1985). In Short, the defendant sought to restrict attendance at depositions in his case on the grounds that the publicity which might ensue would deprive him of his fair trial right. In affirming the trial court's decision not to exclude the public, the Second District wrote:

> [Rule 1.280(c)] gives the trial court control over who may or may not attend depositions; the court's discretion is limited only by the standard "for good cause shown." The rule places the burden of obtaining a protective order on the person or party seeking to limit attendance at a deposition.

Id. at 592.

The Burk majority, although cognizant of the Short decision, made no attempt to distinguish it. The Burk court simply "decline[d] to accept or follow the

precedent," 471 So.2d at 574 n.2, claiming instead to rely on Tallahassee Democrat, Inc. v. Willis, 370 So.2d 867 (Fla. 1st DCA 1979) ("Willis") and Sturgis, 471 So.2d at 574, n.2. This was plain error. Both cases invalidated orders denying press access to discovery materials. Indeed, Willis and Sturgis explicitly acknowledge the presumption of access under the Rules and endorse the "good cause" requirement. Moreover, both cases hold that even though the right of the press to attend pretrial discovery depositions is not absolute, it may properly be regulated by the court only "for good cause shown" under Rule 1.280(c).

In Willis, the First District set aside an administrative order sealing all depositions in civil and criminal cases because the blanket sealing order was in conflict with the case-by-case resolution of access issues mandated by Rule 1.280(c). 370 So.2d at 870-872. Similarly in Sturgis, the Fifth District quashed a protective order sealing all discovery in a criminal case on the grounds that the order was overbroad. Access to discovery, the court held, could only be restricted if the party seeking closure could satisfy the requirements of Rule 1.280(c):

> We therefore conclude that the press does not have the absolute right to attend the taking of a deposition, that its presence may be regulated by the court under Rule 1.280(c), but that once the deposition is taken, transcribed and filed in the court file, there is a right of access to

> it unless a protective order is entered by the court under the said rule.

388 So.2d at 1371.

Ironically, the court below apparently relied on this language in Sturgis to deny access without requiring a showing of "good cause" on the grounds that the Records sought are "unfiled." (emphasis in original) Sturgis, however, does not stand for the proposition that the access right depends on the act of filing. In fact, both Sturgis and Rule 1.280(c) explicitly state that the "good cause" standard applies to regulate press attendance at depositions. Furthermore, at the time Sturgis was decided, all deposition transcripts were required to be filed with the court pursuant to Rule 1.310(f) Fla.R.Civ.P. (1980). The distinction drawn by the court below between "filed" and "unfiled" transcripts simply did not exist until 1981, when Florida changed the "housekeeping rule" to eliminate the routine filing of all deposition transcripts. It, therefore, could not have been the basis of the Sturgis decision.[2]

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[2] See Holtzoff, Origin and Sources of the Federal Rules of Civil Procedure, 30 N.Y.U. L. Rev. 1058, 1059-60, 1072 (1955). That discovery materials and depositions no longer are required to be filed is of no legal consequence because the change in the rules enacted "in an effort to relieve the document storage burden now experienced by all segments of Florida's court system." In re Florida Rules of Civil Procedure, 403 So.2d 926, 926 (Fla. 1981). Florida courts retain the power to order the materials to be filed. See Rules 1.310(f) and 1.350(d), Fla.R.Civ.P.

2. Cases construing the federal counterpart to Rule 1.280(c) also recognize that the discovery rules create a presumptive public right of access

Rule 1.280(c), Fla.R.Civ.P., is derived from Federal Rule 26. Committee Note to Rule 1.280(c). Indeed, the language of the two rules is virtually identical. Thus, this Court may rely equally on the history of the federal rule and the cases interpreting that rule in reaching its decision on the Florida rule. See Willis, 370 So.2d at 869.

Cases interpreting the federal protective order provision also recognize that, "[a]s a general rule, pretrial discovery must take place in the public eye unless compelling reasons exist for denying public access."[3] Broan Manufacturing Co. Westinghouse Electric

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The comments to the parallel federal rules make it clear that third parties continue to enjoy a right of access to discovery materials even if the materials are unfiled. See Rule 5(d), Fed.R.Civ.P.; Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 622-623 (1978) ("It is intended that the court may order filing on its own motion at the request of a person who is not a party who desires access to public records, subject to the provisions of Rule 26(c).")

[3] See, e.g., Waelde v. Merck, Sharp & Dohme, 94 F.R.D. 27, 28 (E.D. Mich. 1981). "A statutory presumption of openness for discovery materials, even those not used at trial, derives from the Federal Rules of Civil Procedure." Tavoulareas v. Washington Post Co., 724 F.2d 1010, 1015 (D.C. Cir.), vacated and remanded on other grounds, 737 F.2d 1170 (D.C. Cir. 1984) (en banc).

Corp., 101 F.R.D. 773, 774 (E.D. Wis. 1984). In fact, federal courts have been "virtually unanimous" in concluding that the rules presume openness independent of any general common law or constitutional access right.[4] Tavoulareas v. Washington Post Co., 724 F.2d 1010, 1015 n.10 (D.C. Cir.), vacated and remanded on other grounds, 737 F.2d 1170 (D.C. Cir. 1984) (en banc).

3. The unmistakable intent of the drafters of the Federal Rules of Civil Procedure was to provide the public with a presumptive right of access to the discovery process

On June 19, 1934, Congress enacted the enabling statute authorizing the Supreme Court to prescribe a set of general procedural rules for the district courts of the United States. In drafting the rules, the Advisory Committee appointed by the Court drew from existing procedure in the federal courts, the states, Great Britain and abroad. Yet many of the most far-reaching and important of the advances made by the new rules were unprecedented. See Holtzoff, Origin and Sources of the Federal

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[4] See, e.g., National Polymer Products v. Borg-Warner Corp., 641 F.2d 418, 423 (6th Cir. 1981); Wilk v. American Medical Ass'n, 635 F.2d 1295, 1299 (7th Cir. 1980); American Telephone and Telegraph Co. v. Grady, 594 F.2d 594, 596 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1979); Broan Manufacturing Co. v. Westinghouse Electric Corp., supra; Waelde v. Merck, Sharp & Dohme, supra; Parsons v. General Motors Corp., 85 F.R.D. 724 (N.D. Ga. 1980); Essex Wire Corp. v. Eastern Electric Sales Corp., 48 F.R.D. 308 (E.D. Pa. 1969).

Rules of Civil Procedure, 30 N.Y.U. L. Rev. 1058, 1059-60 (1955). Perhaps the greatest innovation was the creation of a comprehensive system of pretrial discovery rules.[5] And "probably the biggest single advance" was the new deposition procedure. Id. at 1072.

The Advisory Committee clearly intended to eliminate secrecy and trial by ambush and to create a "complete and untrammeled right of discovery."[6] The drafters own comments indicate a desire to move the focus of the judicial process forward into the newly-created discovery phase and away from trial. But the drafters did not intend that public access to the judicial process be diminished. The minutes of the Committee's meetings

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[5] Florida first provided for the taking of depositions for discovery purposes in 1947. New Section 91.30, Fla. Stat., provided:

> (1) Depositions in chancery and civil cases in the courts of this state may be taken and used under the same circumstances and conditions and for the same purposes and according to the same procedure that depositions are permitted to be taken and used in the district court of the United States under and pursuant to the federal rules of civil procedure.

Prior to the passage of that statute, there was no discovery provided in the Florida rules. As the statute makes clear, its purpose was to extend discovery in Florida to the limits of the federal rules. The history of the federal rules recounted here is thus equally applicable to the Florida rules.

[6] All relevant draft rules and Advisory Committee meeting minutes are set out in Appendix B to this Brief ("App. B.").

reveal that the drafters explicitly considered the question of public access in light of the new provisions for expansive pretrial discovery. These minutes show that the drafters presumed that public access to the judicial process would continue and extend to the pretrial discovery phase to the same extent as the trial itself.

To prevent abuses of the discovery process by lawyers, including "publicity" abuse, the Committee developed a procedural mechanism enabling courts to limit access to discovery where "good cause" for such restriction was shown. It was to this end that the provision here at issue -- the "protective order" -- was created. The Committee thus created a presumptively open pretrial system, which could nevertheless be closed on a showing of abuse.

(a) The drafters of the rules explicitly intended there to be access to depositions absent a showing of "good cause" for closure

When first drafted by Professor Edson Sunderland and approved by the Advisory Committee, the discovery rules gave parties an almost unlimited deposition right. Parties could depose anyone relevant to the cause, including their opponent. See Rule 31, Preliminary Draft of the Federal Rules of Civil Procedure (May, 1936). (App. B. 2)

The only exceptions to this otherwise unrestricted right to take depositions applied when the individual

deposed was one of the parties (or an agent of one of the parties). Rule 32(b) allowed the party-deponent, on a showing of "good cause," to request that his deposition be taken before a master. Rule 32(b), Preliminary Draft. (App B. 8). And Rule 32(c) allowed the party-deponent, when not before a master, to apply to the court for an order halting his deposition on a showing that the deposition was being conducted "in bad faith or for the purpose of oppressing, annoying or embarrassing" the party-deponent. Rule 32(c), Preliminary Draft. (App. B. 9)

Both the Committee Note to Rule 32 and the minutes of the Committee's meeting make clear the purpose of the rule. The Note states:

> The provision for reference to a master is for the purpose of protecting parties from oppression in cases where there is reason to believe that the examination is likely to include matters not properly subject to discovery. It is introduced as a safeguard on account of the unlimited right of discovery given by Rule 31.

Rule 32, Note, Preliminary Draft. (App. B. 9) The Committee thought that the right to depose the adverse party might be abused and so it devised a limited form of protection available only to party-deponents.

The precise nature of the Committee's concern is apparent in the meeting held prior to the publication of the Preliminary Draft. As the minutes of the Committee meeting make clear, certain members feared that suits

might be brought purely for the sake of obtaining the right to depose the adverse party and publicly ventilate facts embarrassing to him:

> Mr. Pepper. Mr. Chairman, I am not worried about the fishing-expedition aspect of this thing, but, in the part of the country I come from, I know perfectly well that this sort of power given to a plaintiff is simply going to be used as a means of ruining the reputation of responsible people. You bring a suit against a man, without any ground whatever, the president of some important company, the president of a utilities company or a bank or something. You take his deposition, have the reporters present, and grill him in the most unfair way, intimating that he is a burglar or murderer, or this, that, and the other. He has no redress, and the next morning the papers have a whole lot of front-page stuff. The case never goes any further. That is all that was intended.
>
> The Chairman. It is too much like some of these Senate committees you used to sit on. (Laughter)
>
> Mr. Pepper. Exactly; and that is where I got a taste of the kind of lawlessness that ruins people's reputations without the opportunity ever to redress the harm that is done.
>
> I do not think there is anything worse than the use of judicial proceedings for the creation of a forum from which, through the newspapers, to harangue the public. The defendant is perfectly helpless. There is no restraint upon the examination.

Minutes of Advisory Committee Meeting (Feb. 22, 1936).

(App. B. 13-14)

The Committee chairman explicitly expressed his belief that the Constitution would require the taking of sworn testimony prior to trial to be presumptively open to the press. The Committee as a whole, however, recognized that abuses of the discovery process could occur and some procedural mechanism was needed so that the courts could deal with them within those Constitutional limitations.

> Mr. Sunderland. The particular difficulty you suggested, Senator, by way of publicity as a result of the discovery examination, is one that does not actually occur very often, but I think it should be provided against by a rule that upon the request of either party the officer taking the deposition should exclude from the room where the deposition is being taken all persons not immediately concerned with the taking of it.
>
> Mr. Pepper. Our judges would never make a rule like that.
>
> Mr. Morgan. Is not the protection the one Judge Olney spoke of? If the questions are impertinent and do not relate to the merits, if it is the adverse party counsel will tell him not to answer, and then the only way you can determine whether or not he has to answer is by an application to the court for an order to compel him to answer. Then the whole thing will be threshed out before the court, and no answer will be given until the court orders him to answer. There the whole thing can be handled that way to protect against abuse. Certainly if I were appearing for an adverse party he would not answer if the questions got out of bounds, until the court told him he had to.

> Mr. Pepper. Of course, there is a lot in that. It is all a question of whether the thing is going to work out happily and decently, and in sportsmanlike fashion, the way it evidently does in California, or whether it is going to work out along some such lines as I perhaps mistakenly apprehend.
>
> But if it works out the way I venture to apprehend, the publicity is: "important Question Asked of President of X.Y.Z. Company. Corporation Attorney Instructs Witness Not to Answer."
>
> Where are the liberties of the citizen, and all that? That is what you get in the newspaper the next day, and it is a lot worse than if you answered, because the question might be susceptible of being answered No.
>
> Mr. Dodge. I am not accustomed to having depositions taken in public.
>
> Mr. Pepper. They always are with us.
>
> The Chairman. Is that not a Constitutional requirement?

Minutes of Advisory Committee Meeting (Feb. 22, 1936). (App. B. 16-17)

As these excerpts from the Advisory Committee meeting make quite clear, the drafters provided for a virtually unlimited deposition right with full knowledge of the fact that the depositions taken would be open for all to attend and see. The presumption of access that underlies the discovery rules could not be more plainly stated. However, the drafters, in their wisdom, recognized that such a system could be abused and determined to

provide litigants with a procedural vehicle for limiting access when "good cause" was shown.

(b) The protective order provision was drafted specifically to regulate public attendance at depositions

The Preliminary Draft of the Rules was published in May, 1936, and the Advisory Committee solicited comments from lawyers and bar associations across the country. As the Committee had anticipated, the new discovery rules were among the most controversial of the new provisions.

One comment which apparently carried great weight with the Committee concerned the "master" provision in Rule 32. The comment is reflected in the handwritten annotations of two of the primary drafters of the discovery rules, both law professors: Edson Sunderland of Michigan and Edmond Morgan of Harvard. Morgan's copy of the Preliminary Draft possesses the following marginalia opposite Rule 32(b):

> Sterry[7]: At any rate court should have power to order depo to be taken privately and to be sealed to avoid depo for publicity only.

Notes of Edmond Morgan. (App. B. 20) Sunderland's copy likewise reflects a comment by Sterry, but noted the

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[7] Referring to Norman Sterry, a Los Angeles attorney.

comment in terms of a draft rule authorizing the court to order:

> in proper cases, that the examination be held behind closed doors with no one present except counsel and parties to the record and that after being sealed the deposition shall be opened only by order of the court.

Notes of Edson Sunderland. (App. B. 8)

When the Advisory Committee returned to its work, Rule 32 was modified to reflect the Sterry suggestion. By February, 1937, subdivision (c) of the Rule, which had allowed parties to object to their questioning during deposition and to have it stopped, was extended to all deponents and moved to Rule 34. See Rule 34(f)(2), Preliminary Draft (Feb. 1937). (App. B. 25). Subdivision (b), the "master provision," was eliminated entirely. In its stead, the Committee substituted the newly created protective order, Rule 34(f)(1):

> (f) Orders for the Protection of Parties and Deponents.
>
> (1) After notice is served for taking a deposition by oral examination, the court in which the action is pending, on motion of any party or of any person to be examined, seasonably made and upon notice and good cause shown, may make an order that such deposition shall not be taken, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the record or their officers or counsel and that

> after being sealed the deposition shall be opened only by order of the court or that secret processes, developments, or research need not be disclosed or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court, or may make any other order which justice may require to protect the party or witness from annoyance, embarrassment or oppression.

Rule 34(f)(1). Preliminary Draft (Feb. 1937) (emphasis added) (App. B. 24-25)

The evolution of the protective order provision demonstrates that the presumption of access underlying the rules recognized by modern courts has a factual historical basis. The drafters created a system of wide open pretrial discovery to allow for a fairer and more efficient resolution of cases. The establishment of a pretrial fact finding phase was never intended to alter or abridge the public character of the judicial process. Concerns about how pretrial discovery and access might negatively affect the process led first to the master provision and later to the protective order provision. The history recounted here plainly shows that neither of those provisions would ever have been written had the drafters not proceeded from a presumption of public access.

B. The Presumptive Right Of Access Provided By The Rules Can Only Be Overcome By (1) A Particularized Factual Demonstration By The Party Seeking Closure That (2) Access Will Cause "Significant Harm" To A Protected Interest Which (3) Outweighs The Public Interest In Access To His Case

The right of access to discovery materials created by the Rules is "qualified," not absolute. Nevertheless, the presumption is in favor of access and that presumption may only be overcome by a showing of "good cause."[8] Seattle Times Co. v. Rhinehart, supra (protective order restricting access does not offend the First Amendment if it is "entered on a showing of good cause as required by Rule 26(c)".) In the court below, Senator Hawkins made no showing of "good cause" and the trial court did not require her to do so. Thus, this Court should reverse and remand to allow the Senator to attempt to show "good cause" why a protective order should issue.

Although this Court need go no further in its analysis, the press Petitioners would urge this Court to take this opportunity to provide guidance to the lower courts in applying the "good cause" standard. A general review of the cases construing the "good cause" requirement, suggests courts have looked to three considerations

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[8] The argument in this Section is entirely independent of any First Amendment right of access to pretrial discovery materials and is based solely on the generally recognized "good cause" requirement.

in determining whether "good cause" has been shown to justify denying access to discovery materials. First, the courts have insisted that a movant seeking a protective order must make a "specific demonstration" of harm. Second, the harm shown must be "significant." Finally, this particularized showing of substantial harm must outweigh the public interest in access.

1. "Good cause" must be shown by a "particular and specific demonstration of fact"

In discovery disputes in general, a showing of "good cause" requires "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." Wright & Miller, Federal Practice and Procedure: Civil, Section 2035 at 264-65; see General Dynamics Corp. v. Selb Manufacturing Co., 481 F.2d 1204, 1212 (8th Cir. 1973), cert. denied, 414 U.S. 1162 (1974); United States v. Purdome, 30 F.R.D. 338, 341 (W.D. Mo. 1962). A "general objection" does not constitute "good cause." Id. at 341.

Courts deciding discovery disputes relating to access likewise require specific demonstrations of fact to show "good cause" for closure. In Cipollone v. Liggett Group, Inc., 785 F.2d 1108 (3d Cir. 1986), defendant cigarette manufacturers sought to bar plaintiffs from disseminating facts learned in discovery regarding the

health risks of smoking to the public. The Third Circuit explained that to show "good cause" for a protective order restricting dissemination of discovery materials, a party must "demonstrat[e] a particular need for protection." Id. at 1121. "Broad allegations of harm, unsubstantiated by specific examples of articulated reasoning" were found to be insufficient. Id. (citations omitted) The Cipollone court remanded the case to the trial court for a factual determination of whether "good cause" existed to justify the protective order sought. On remand, the trial court rejected the application for protective order, in part because defendants' attempted "good cause" showing lacked specificity:

> In essence, defendants now argue that if the truth be known and discovery disclosed it might prove embarrassing and affect the market price of defendants stock. Such a sweeping allegation, however, does not reach the level of specificity that the Third Circuit has emphasized is required by Rule 26(c). Defendants have shown that their financial standing has been affected by this and related litigation. Defendants have not substantiated, however, how preventing the release of all discovery materials is needed to prevent particularized, significant injury to their financial and competitive position. Defendants have not identified a single document which they contend will or might have such an effect.

Cipollone v. Liggett Group, Inc., Nos. 83-2864, 84-678 slip. op. at 5 (D.N.J. Nov. 12, 1986).

In those cases in which protective orders limiting disclosure have been entered or upheld, the parties seeking protection have made the properly particularized showing required to support closure. Thus, in Tavoulareas v. Washington Post Co., 111 F.R.D. 653 (D.D.C. 1986), Mobil Oil submitted an affidavit explaining how release of certain discovery materials would jeopardize extremely important and lucrative international contracts with concerns in Saudi Arabia. The affidavit demonstrated the difficulty Mobil faced in dealing with powerful foreign oil interests whose cultural values were antithetical to public disclosure of business dealings. The potential competitive injury to Mobil and to the United States outweighed the public access claims, at least where so much of the information at issue was already public as a result of the litigation process. Likewise, in Seattle Times Co. v. Rhinehart, supra, the Court noted with approval that the trial court had initially denied the protective order sought because the facts alleged "were too conclusory to warrant a finding of 'good cause.'" 104 S.Ct. at 2204. Only after affidavits from members of the Aquarian Foundation were submitted describing incidents of violence which had already been committed against them and detailing the letters and telephone calls which threatened their members with physical harm, did the trial court agree to enter a narrowly tailored protective

tailored protective order prohibiting any gratuitous disclosure of the identities of cult members and contributors.

2. The party seeking closure must show "significant harm" to a protected interest

The "good cause" requirement is "not a mere formality, but is a plainly expressed limitation" on the authority of courts to grant protective orders. Schlagenhauf v. Holder, 379 U.S. 104, 118 (1964) (discussing the "good cause" requirement formerly contained in Rule 34). A party must prove that the harm he will suffer as a result of disclosure is "significant, not a mere trifle." Cipollone v. Liggett Group, Inc., 785 F.2d at 1121.

The "good cause" requirement is particularly stringent where a litigant is seeking to limit disclosure. As numerous courts have recognized, most litigants would rather not have the details of their lawsuits generally known. But a mere preference for non-disclosure never justifies secrecy. Only if the embarrassment caused is "unreasonable" or "particularly serious" is the issuance of a protective order justified. As one court recently stated:

> Where a party will suffer unreasonable annoyance or embarrassment protective orders should be granted. A mere showing of some embarrassment, annoyance or expense, however, does not require the issuance of a protective order. A burden which litigants in

> which the litigant would rather the public not know. Courts have the resources to examine the issues and intervene only when that burden becomes unreasonable.

Ericson v. Ford Motor Co., 107 F.R.D. 92, 94 (E.D. Ark. 1986).[9]

Thus, in Rhinehart, members of the Aquarian Foundation showed that disclosure threatened their First Amendment rights and their physical well-being. In Tavoulareas, Mobil showed that an important contractual relationship would be destroyed by disclosure. In Miller v. Mecklenburg County, 606 F.Supp. 488 (W.D. N.C. 1985), the court found the need to protect the identity of a reporter's confidential source, who faced physical harm if his identity were described, to be "good cause" sufficient to issue a protective order.

For "good cause," then, a party must demonstrate that he will be harmed by disclosure in a way that is significantly greater or more serious than the typical litigant.

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[9] See also Cipollone v. Liggett Group, 785 F.2d at 1121 ("[B]ecause release of information not intended by the writer to be for public consumption will almost always have some tendency to embarrass, an applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious".) Likewise, "[t]he mere fact that a case has achieved notoriety which may attract attention to information is not sufficient ground for protection." Ramada Inns, Inc. v. Drinkhall, 490 A.2d 593 (Del. 1985).

3. "Good cause" is shown only when the party's specific demonstration of significant harm to a protected interest outweighs the public's interest in access

If a movant seeking to exclude the public from access to discovery materials has made a specific factual demonstration of substantial harm to a legitimate interest, the court must balance that showing against the interest in public access to the materials.

Where the information is central to the litigation or there is otherwise a strong public interest in it, the balance should be struck in favor of access. For example, in Koster v. Chase Manhattan Bank, 93 F.R.D. 471 (S.D. N.Y. 1982), a case decided prior to Rhinehart but explicitly applying the "good cause" analysis without regard to the First Amendment, the court declined to issue a protective order restricting dissemination of certain sexual information where the plaintiff alleged sexual harassment, stating:

> Ordinarily, one's privacy interest in preventing the public disclosure of the details of a sexual relationship might be viewed as a reason for granting a protective order. In this instance, however, the information is not irrelevant matter that was revealed as a by-product of the liberal discovery rules. Rather, the facts underlying the plaintiff's allegations that Ross forced her to have sex for the purpose of "safe-guarding her career" and that he abused her when

> be proven if the plaintiff is to prevail on her cause of action.

Id. at 482. Thus, where information is "highly relevant to the issues in the lawsuit" the interest in limiting pretrial disclosure is minimal because the information is so likely to come out at trial, assuming there is one, and the public has a right to know information that sheds important light on the merits of a litigation.

Moreover, the mere fact that the person opposing the protective order plans to use the information learned for some purpose extrinsic to the litigation does not constitute an "abuse of discovery" meriting the court's protection. See Cipollone v. Liggett Group, Inc., Nos. 83-2864, 84-678, slip op. at 9 (D.N.J. Nov. 12, 1986). Often information discovered in one lawsuit is of use in another. Id.; see also Erickson v. Ford Motor Co., supra. In fact, one of the purposes of the discovery rules is to foster such efficiency in the judicial process. See Wilk v. American Medical Association, supra ("This presumption [of access] should operate with all the more force when litigants seek to use discovery in aid of collateral litigation on similar issues, for in addition to the abstract virtues of sunlight as a disinfectant, access in such cases materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy process.")

It is likewise immaterial whether the person opposing the protective order is a party to the litigation or some third party "uninvolved" in the underlying lawsuit. All members of the public have a right to monitor civil litigation to see if justice is being done. See Tavoulareas v. Washington Post Co., supra (applying the same "good cause" test to access requests by The Washington Post, a party to the action, and The Reporter's Committee, a press intervenor). The "good cause" requirement must be fulfilled before access to discovery can be restricted in any way. This is true even if the parties stipulate to the restriction. Thus, in Krekel Publications, Inc. v. Waukesha Freeman, Inc., 98 F.R.D. 745 (E.D. Wis. 1983), the court declined to seal the discovery in an antitrust action involving two newspapers even though both parties requested closure and no third party objected. The court refused to accommodate the parties because they had failed to show "good cause" for the closure requested:

> Concededly, Rule 26(c) and interpretive caselaw look to situations where the parties disagree on the proper scope of discovery. Nonetheless, the rule reflects an attitude favoring open discovery in the absence of special circumstances.

Id. at 746; but see Burk, supra.

Ultimately, the trial court must balance the significance of the harm shown by the party seeking the court's protection against the nature of the public inte-

rest in disclosure, and determine whether "good cause" exists to issue a protective order. The public always has a legitimate interest in the workings of the judicial process. However, in certain circumstances, the public interest in access is heightened.

This is clearly the case whenever a litigation involves a matter of general public concern, see, e.g., In re Agent Orange Product Liability Litigation, 104 F.R.D. 559, 573 (E.D.N.Y. 1985) (lifting the vast majority of a broad protective order because of the public interest information regarding "Agent Orange"); or when one of the parties is a public official. See Prescott Publishing Co. v. Norfolk County, 395 Mass. 274, 479 N.E.2d 658 (1985) (vacating protective order which sealed financial statements and deposition transcripts in a divorce proceeding because the county treasurer was one of the parties involved); Plaquemines Parish Commission Council v. Delta Development Co., 472 So.2d 560 (La. 1985) (vacating protective order for lack of "good cause" where parties were public officials and the subject matter of the lawsuit concerned their official behavior). In these cases, while the party seeking protection may have shown strong reasons to restrict access, the trial court, in consideration of the "nature and degree of the public interest" in the information, should deny the relief requested.

C. Hawkins Did Not Meet The Stringent Test For "Good Cause"

Senator Hawkins did not show "good cause" to restrict access to the Records. First, she utterly failed to make a particularized factual demonstration to justify closure. In fact, Hawkins presented no evidence of any kind. Instead, she simply asserted a general privacy interest in the Records because they relate to her health. She did not allege that the medical information was peculiarly embarrassing, nor did she point to specific facts in the Records that she considered private. Such a general showing did not and cannot meet the "good cause" requirement. If this Court holds Hawkins is entitled to keep these discovery materials secret, the unfiled discovery materials in every personal injury lawsuit will be closed to the public. Such a result cannot be correct.

Second, Hawkins failed to show that access would cause a significant or substantial injury to some protected interest. As a United States Senator and candidate for reelection, Hawkins legitimate interest in privacy is greatly reduced. Prosser & Keeton, Law of Torts 844-45 (5th Ed. 1984). By "willingly enter[ing] into the public sphere," Hawkins sacrifices her right to privacy to the extent that the information at issue concerns her public life. Kapellas v. Kofman, 81 Cal.Rptr. 360, 459 P.2d 912, 922 (1969). "A politician running for public office, in effect offers his public and private life for perusal so

far as it affects his bid for office." Stryker v. Republic Pictures Corp., 108 Cal.App.2d 191, 194, 238 P.2d 670, 672 (1951). As a plaintiff in a personal injury lawsuit, Hawkins is in a similar position. She has voluntarily placed her health in issue by suing in court. She cannot complain because "highly relevant" facts are disclosed. Cf. Koster v. Chase Manhattan Bank, supra.

Finally, the Senator fails the "good cause test" because her diminished privacy interest is overcome by the tremendous public interest in the Records. There is a public interest in all litigation and the functioning of the judicial process is general. This interest is substantially magnified when an elected public official or candidate for office such as Hawkins is involved. As this Court stated in Yorty v. Stone, 259 So.2d 146, 149 (Fla. 1972), in the case of a candidate for national office, "the public interest transcends the bounds of privacy accorded to an individual citizen." Public access is essential where information relating to a candidate's fitness is at issue:

> In choosing those who are to govern them, the public must, of course, be afforded the opportunity of learning about any facet of a candidate's life that may relate to his fitness for office.

Kapellas, supra, at 922-923; see Garrison v. Louisiana, 379 U.S. 64, 77 (1964). The Records related directly to Hawkins' fitness for office at a time when such information

was of primary importance to the public, and the Senator failed to show "good cause" to restrict access to them.

II. THE DECISION OF THE FIFTH DISTRICT SHOULD BE REVERSED BECAUSE HAWKINS FAILED TO OVERCOME FLORIDA'S COMMON LAW PRESUMPTION FAVORING ACCESS TO CIVIL DISCOVERY RECORDS AND PROCEEDINGS

The Fifth District's decision must be reversed because Florida common law, like federal common law, provides a presumptive right of access to civil discovery records and proceedings. Hawkins failed to make the showing necessary to overcome this presumptive right.

A. The Presumptive Common Law Right Of Access Extends To Depositions and Discovery Documents in Civil Cases

1. To restrict access a movant must demonstrate that closure will prevent a serious threat to the administration of justice and that no less restrictive alternative will suffice

Florida courts have consistently recognized that the public enjoys a presumptive right of access to all judicial proceedings, criminal or civil.[10] Federal

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[10] State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904, 908 (Fla. 1976); Goldberg v. Johnson, 485 So.2d 1386 (Fla. 4th DCA 1986); Sentinel Star Co. v. Edwards, 387 So.2d 367, 374 (Fla. 5th DCA 1980), pet. denied, 399 So.2d 1145 (Fla. 1981); State ex rel. Gore Newspaper Co. v. Tyson, 313 So.2d 777, 783 (Fla. 4th DCA 1975), overruled on procedural grounds in

courts have likewise recognized that the common law right of access extends to civil records and proceedings.[11]

This Court explained the common law test for restricting access to judicial records and proceedings in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), which concerned access to a pretrial hearing on a motion to suppress. To obtain closure a movant must show: (i) closure is necessary to prevent a serious and imminent threat to the administration of justice; (ii) no alternatives are available, other than change of venue, which would protect a defendant's right to a fair trial; and (iii) closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose. Id. at 3. In addition, "those seeking closure have the burden of producing evidence and proving by a greater weight of the evidence

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English v. McCrary, 348 So.2d 293 (Fla. 1977); Miami Herald Publishing Co. v. Collazo, 329 So.2d 333 (Fla. 3d DCA), cert. denied, 342 So.2d 1100 (Fla. 1976)

[11] See, e.g., Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-598 (1978); In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 10 Media L.Rep. (BNA) 2430 (9th Cir.), cert. dismissed, 469 U.S. 1100 (1984); Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1066-1067 (3d Cir. 1984) (recognizing a public right of access to civil trials and records); Brown and Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983), cert. denied, 465 U.S. 1100 (1984); Olympic Refining Co. v. Carter, 332 F.2d 260, 265-266 (9th Cir.), cert. denied, 379 U.S. 900 (1964) (disclosure of documents to non-party ordered despite claim that documents contained trade secrets and sensitive information).

that closure is necessary, the presumption being that a pretrial hearing should be an open one." Id. at 8; see also Bundy v. State, 455 So.2d 330 (Fla. 1984).

The Lewis test is equally applicable to civil judicial proceedings. Goldberg v. Johnson, 485 So.2d 1386, 1388 (Fla. 4th DCA 1986). In Goldberg, the Fourth District reviewed a trial court order declining to unseal certain records in a civil guardianship proceeding based on the three-part test articulated in Lewis and Bundy. While serving as a representative of a deceased's estate, Goldberg asserted a right as a member of the public to intervene in the guardianship proceedings to attempt to obtain access to documents previously sealed by the court. The trial court denied intervention and refused to unseal the records. 485 So.2d at 1387-88. The Fourth District reversed, concluding that the order sealing the records failed to satisfy any prong of the Lewis test. The Fourth District explicitly held that neither (i) the desire of the guardian to prevent media harassment of the minor subject of the proceeding; (ii) the fact that the intervenor as a member of the public had no legitimate interest in inspecting the records; nor (iii) the fact that the parties had agreed and requested that the agreements be sealed would support the sealing of judicial records under the Lewis test. Id. In short, the Court found "a litigant's preference that the public not be apprised of

the details of his litigation is not grounds for closure." Id. at 1389.

2. Civil depositions and discovery documents are judicial proceedings and court records

The court below relied on Burk in denying press Petitioners access to the Records. The court implicitly held that no common law right of access applies to depositions or to discovery documents because they are not "judicial proceedings" or "judicial records." These conclusions are flatly incorrect.

Depositions in civil actions are "judicial proceedings" under Florida law. The Florida Rules of Civil Procedure create the right to take discovery through the use of depositions and interrogatories and to serve requests for production and requests for admissions. Rules 1.300-1.370, Fla.R.Civ.P. The Rules provide for the issuance of subpoenas to compel attendance at depositions and govern the manner in which depositions must be taken. Rule 1.280, 1.290, Fla.R.Civ.P. Moreover, only attorneys, as officers of the court, may take depositions and only an official court reporter may record a deposition. Depositions and other fruits of discovery may be used at trial for impeachment or in lieu of live testimony. Rule 1.330, Fla.R.Civ.P. The testimony taken at deposition must be under oath and interrogatories must be answered under oath; and violations can result in perjury

or contempt convictions. Failure to make discovery is also punishable by the court through its contempt powers and through preclusive sanctions. Rule 1.380, Fla.R.Civ.P. The court is always constructively present because disputes over depositions, as well as other discovery efforts, must be resolved by the court. Rule 1.380, Fla.R.Civ.P. It is the court that controls the proceeding. Burk and the decision of the Fifth District here ignore all of these factors. The Florida Rules of Judicial Administration also specifically characterize discovery depositions as judicial proceedings; Rule 2.070(f). Fla.R.Jud. Admin. (transcripts of all judicial proceedings, including depositions, shall be uniform in and for all courts throughout the state) (emphasis added); Rule 2.070(c)(1), Fla.R.Jud.Admin. ("When the chief judge deems it appropriate or necessary, he may by administrative order authorize the use of electronic reporting for any judicial proceedings, including depositions, required to be reported.") (emphasis added) Perhaps most important, prior to the "housekeeping rule" which dispensed with mandatory filing, all discovery material had to be filed and the common law right of access applied to them without question.

It follows that deposition transcripts are "records of a court proceeding" and thus "judicial records." News-Press Publishing Co. v. State, 345 So.2d

865, 867 (Fla. 2d DCA 1977); see Sussman v. Damian, 355 So.2d 809, 811 (Fla. 3d DCA 1977) ("It is established law of this state that defamatory words published by lawyers during the due course of a judicial proceeding are absolutely privileged . . . . This privilege extends to the taking of a deposition."); see also Jamason v. Palm Beach Newspapers, Inc., 450 So.2d 1130 (Fla. 4th DCA 1984), rev. denied, 461 So.2d 115 (Fla. 1985).[12]

Moreover, access to the discovery process serves important public purposes. A large percentage of civil cases never go to trial because they are settled or dismissed. Discovery depositions are frequently left unfiled and even untranscribed. If parties are permitted to determine what discovery materials are available to the public by filing them selectively or not at all, the public will be denied any meaningful access to the judicial

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[12] Many trial courts decisions have held that civil discovery depositions are judicial proceedings. See, e.g., Withlacoochee River Electric Cooperative v. Seminole Electric Cooperative, 1 Fla. Supp.2d 137, 8 Media L.Rep. (BNA) 1281 (13th Cir. Ct. 1982); Florida ex rel. Scott v. City Clerk, 8 Media L.Rep. (BNA) 1164 (Fla. 15th Cir. Ct. 1982); Johnson v. Broward County, 2 Fla. Supp.2d 65, 7 Media L.Rep. (BNA) 2125 (17th Cir. Ct. 1981); Cazarez v. Church of Scientology, 3 Fla. Supp.2d 162, 6 Media L.Rep. (BNA) 2109 (6th Cir. Ct. 1980). In the criminal context, see, Florida v. Tolmie, 421 So.2d 1087 (Fla. 4th DCA 1982); Florida v. O'Dowd, 9 Media L.Rep. (BNA) 2455 (Fla. 18th Cir. Ct. 1983); Florida v. Hodges, 7 Media L.Rep. (BNA) 2424 (Fla. 20th Cir. Ct. 1981); Florida v. Sanchez, 1 Fla. Supp.2d 116, 7 Media L.Rep. (BNA) 2338 (15th Cir. Ct. 1981); Florida v. Diggs, 5 Media L.Rep. (BNA) 2596 (Fla. 11th Cir. Ct. 1980); Bundy v. Florida, 455 So.2d 330 (Fla. 1984); Florida v. Alford, 5 Media L.Rep. (BNA) 2054 (Fla. 15th Cir. Ct. 1979).

process. In this case, the proceedings involve claims of permanent impairment to a public official seeking re-election. The public's right to know should not be compromised in so important a matter merely because the parties or their attorneys choose not to file discovery materials with the court.

B. Hawkins Has Failed To Make The Showing Necessary To Overcome The Public's Presumptive Common Law Right Of Access

Senator Hawkins has made no showing whatsoever that access to discovery materials in her civil personal injury action must be denied. The Senator has not shown that closure of these records was necessary (i) to prevent a serious and imminent threat to the administration of justice, or (ii) that no less restrictive alternative measures are available which would mitigate the danger; or (iii) that the measure being considered will in fact achieve the court's protective purpose. In fact, Hawkins has made no showing at all.

Neither the trial court nor the appellate court made any findings which could be examined by this Court. Even so, it is difficult to imagine how Hawkins could attempt to satisfy the Lewis test. The Senator's privacy interest in the Records is minimal and the public interest in them overwhelming. Whatever else may be contained in the Records sought, those portions which show that

the Senator is seriously impaired, either by her injuries or due to the medication or treatment administered for those injuries, are relevant to her physical fitness to hold office and the public has a right to see them. If portions of the Records are irrelevant to the Senator's ability to perform her official duties, she could identify those portions and any protective order entered could be narrowly tailored to restrict access to those portions.

While the Senator contends that there is no rule of law requiring that everything in a private civil dispute be made a public record (App. A. 24), this is not a "private" dispute:

> [W]henever litigants utilize the judicial process they place themselves in the position where the details of their difficulties will invariably be made public. It is sometimes felt that this is too high a price to pay for living in a civilized society, particularly when measured against a person's right to privacy . . . . But every right is not absolute to the point of inflexibility; some rights must bend and give way to other rights in certain instances.

Gore, supra, at 784; see also Goldberg, supra. Paula Hawkins as a United States Senator and as a plaintiff has taken this dispute out of the private domain.

III. THE DECISION OF THE FIFTH DISTRICT SHOULD BE REVERSED BECAUSE HAWKINS FAILED TO SHOW "GOOD CAUSE" FOR CLOSURE AS REQUIRED BY THE FIRST AMENDMENT

In Seattle Times Co. v. Rhinehart, supra, the United States Supreme Court explicitly held that protective orders restricting dissemination of discovery do not offend the First Amendment so long as they are entered on a showing of "good cause" as required by the discovery rules.[13] 104 S.Ct. at 2204. Because the court below did not require Hawkins to make a "good cause" showing, the order restricting access to the Records clearly violates the First Amendment and must be reversed.

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[13] The press Petitioners reserve the right to argue that Rhinehart is incorrect in holding that there is no First Amendment interest in civil discovery materials.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Fifth District Court of Appeal and remand this case to the trial court to determine whether Hawkins has "good cause" to restrict access to the Records. The certified question should be answered in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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